

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

PAUL ROBERT HAGER,

Defendant and Appellant.

E036055

(Super.Ct.No. SWF002901)

OPINION

APPEAL from the Superior Court of Riverside County. James T. Warren, Judge.
Affirmed.

Patrick J. Hennessey, Jr., under appointment by the Court of Appeal, for
Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney
General, Gary W. Schons, Senior Assistant Attorney General, and Rhonda L. Cartwright-
Ladendorf, Supervising Deputy Attorney General, for Plaintiff and Respondent.

Pursuant to a plea bargain defendant Paul Robert Hager pled guilty to six counts of committing lewd acts on a child under the age of 14, his stepdaughter, (Pen. Code, § 288, subd. (a)) in exchange for a sentence ranging from three to eighteen years in state prison. In accordance with the plea agreement, the trial court sentenced defendant to 18 years in state prison. The sentence was comprised of the eight-year upper term on count 1 and five consecutive two-year terms (1/3 of the midterm) on counts 2 through 6.

Defendant's sole contention on appeal is that the sentence to which he agreed in his plea bargain must be modified because it violates the rule of *Blakely v. Washington* (2004) 542 U.S. ____ [124 S.Ct. 2531, 159 L.Ed.2d 403]. We disagree and affirm.¹

In *Blakely, supra*, 542 U.S. at p. ____ [124 S.Ct. 2531], the United States Supreme Court reaffirmed the conclusion it had reached in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] (*Apprendi*): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi, supra*, 530 U.S. at p. 490; *Blakely, supra*, 542 U.S. at p. ____ [124 S.Ct. at p. 2536].) In *Blakely*, the court stated that "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. [Citations.]" (*Blakely, supra*, 542 U.S. at p. ____ [124 S.Ct. at p. 2537].) It explained: "In other words, the relevant 'statutory

¹ We recognize that the issues are pending before our state Supreme Court. (*People v. Towne*, review granted July 14, 2004, S125677; *People v. Black*, review granted July 28, 2004, S126182.)

maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings.” (*Ibid.*)

Penal Code section 1170, subdivision (b), provides in pertinent part: “When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the court shall order imposition of the middle term, unless there are circumstances in aggravation or mitigation of the crime.” Defendant argues that, under *Blakely*, since the aggravating circumstances on which the court relied to exceed the middle term were not found by a jury or admitted by him, the imposition of the upper term violated *Blakely*.

The question presented by defendant is this: Under California’s Determinate Sentencing Act (DSA; Pen. Code, § 1170 et seq.) should the “statutory maximum,” which under *Blakely* cannot be exceeded without jury findings, be deemed to be the upper term stated in the statute prescribing the punishment for the crime, or the statutory middle term, which Penal Code section 1170, subdivision (b) says shall be given unless the court finds aggravating or mitigating circumstances?

Blakely does not provide a direct answer to this question. *Blakely* dealt not with an upper term -- i.e., a term at the high end of the statutory range -- but with an “exceptional sentence” that exceeded the upper term of the statutory range. Thus, the sentencing provision declared unconstitutional in *Blakely* operated like an enhancement, not an upper term, under the DSA. Unlike an enhancement in California, the exceptional sentence in *Blakely* could be imposed based on the judge’s unilateral findings of facts, with no jury determination or admission by the defendant of those facts.

We believe that *Blakely*'s statement should be understood according to the context in which it was stated -- a case in which the court did not give what would be the equivalent of an upper term under the DSA, but exceeded that term to impose almost double the upper term. For that reason we do not believe that the *Blakely* court, if it were to consider California's sentencing system, would apply its definition literally to find unconstitutional the statutory authority of a court to give the upper term if it finds aggravating circumstances. Rather, we believe, the *Blakely* court would find unconstitutional only a term exceeding the upper term without supporting admissions by the defendant or jury findings.

Accordingly, as we read *Blakely*, "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*" (*Blakely, supra*, 542 U.S. at p. ____ [124 S.Ct. at p. 2537]) should be taken to mean the maximum term of the sentencing range the Legislature has chosen for that offense.

In this case, the upper term defendant received was within his plea agreement (based on his guilty plea and admissions) and the range imposed by the statute that specified the standard range of punishment for the offense. The court did not exceed that range by imposing more time under a separate statute, as the judge in *Blakely* did. The upper term, therefore, is not analogous to the 90-month term that the court found unconstitutional in *Blakely*. Rather, it is analogous to the 53-month high end of the standard range in *Blakely*, which the court never suggested might pose any constitutional problem. The appropriate California analog for the additional 37 months by which the 90-month exceptional sentence in *Blakely* exceeded the 53-month high end of the

standard range is a sentence enhancement. An enhancement, like the exceptional sentence in *Blakely*, increases the sentence beyond the standard range of lower, middle, and upper terms set forth in the statute specifying the punishment for the offense. Under *Blakely*, a fact used to impose an exceptional sentence must be admitted by the defendant or found to be true by a jury. The same is true of an enhancement in California. (Pen Code, § 1170.1, subd. (e).)

Blakely itself referred to the type of sentence term it determined to be unconstitutional -- one that causes the overall sentence to exceed the statutory maximum -- as an “enhancement.” (*Blakely, supra*, 542 U.S. at p. ____ [124 S.Ct. at p. 2538, fn. 8].) Though it did not use the term “enhancement,” the *Blakely* court’s comparison of determinate and indeterminate sentencing systems also supports the conclusion that the type of sentence term *Blakely* found unconstitutional is analogous to a California sentence enhancement rather than an upper term. *Blakely* acknowledged that indeterminate sentencing systems “involve judicial factfinding,” since a judge “may implicitly rule on those facts he deems important to the exercise of his sentencing discretion.” (*Blakely, supra*, 542 U.S. at p. ____ [124 S.Ct. at p. 2540].) The *Blakely* court explained why that kind of judicial factfinding is permissible, but factfinding that yields a penalty exceeding the statutory maximum is not: “In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence -- and by reason of the Sixth Amendment the facts bearing upon that

entitlement must be found by a jury.” (*Blakely, supra*, 542 U.S. at p. ____ [124 S.Ct. at p. 2540].)

An upper term under the DSA operates like the 40-year term referred to in the first system described in *Blakely*’s example. Why, then, are indeterminate sentencing systems constitutional under *Blakely* even though the court acknowledged that they “involve judicial factfinding”? (*Blakely, supra*, 542 U.S. at p. ____ [124 S.Ct. at p. 2540].)

Blakely’s answer is that the judicial factfinding under such a system only permits a judge to “implicitly rule on those facts he deems important to the exercise of his sentencing discretion.” (*Ibid.*) If that is the relevant criterion, an upper term under the DSA should be constitutional too. Findings of aggravating circumstances also consist of a judge ruling “on those facts he deems important to the exercise of his sentencing discretion” within the range set forth in the statute prescribing the punishment. They do not operate to remove the upper term limit and make available a much greater sentence, as the finding of deliberate cruelty did in *Blakely*. That function is served by enhancements, not upper terms.

Decisions of our own Supreme Court also support the conclusion that the type of sentence *Blakely* found unconstitutional is analogous to an enhancement, not an upper term, under the DSA. Although our Supreme Court has not yet addressed the application of *Blakely* to sentencing under the DSA, it has on several occasions considered the application of *Apprendi*. The court has consistently read *Apprendi* to apply to enhancements, not to upper terms. (*In re Varnell* (2003) 30 Cal.4th 1132; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 326.) Here, the “statutory maximum” for purposes

of *Blakely* should be deemed to be the upper term, not the middle term, just as the statutory maximum in *In re Varnell*, was the upper term and not the middle term. That being the case, imposition of the upper term does not violate *Blakely*.

For the foregoing reasons, we conclude *Blakely* does not prohibit a California court from imposing an upper term under the DSA based on facts not found by a jury or admitted by the defendant. Accordingly, sentencing defendant to the upper term was not unconstitutional under *Blakely*.

Also, in this court's view, there is no *Blakely/Apprendi* problem in imposing consecutive sentences in this case. Consecutive sentences were not at issue in either *Blakely* or *Apprendi*. *Blakely* states *Blakely* “further agreed to an additional charge of second-degree assault involving domestic violence. [Citation.] The 14-month sentence on that count ran concurrently and [was] not relevant” (*Blakely, supra*, 542 U.S. at p. ___, fn. 2 [124 S.Ct. at p. 2534].) *Apprendi* stated that the possibility of the defendant receiving consecutive sentences was irrelevant to determining whether the enhanced sentence on one count was constitutional. (*Apprendi, supra*, 530 U.S. at p. 474.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HOLLENHORST

J.

We concur:

RAMIREZ

P.J.

KING

J.